Supreme Court, U.S.
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No. 01-1311

In The

Supreme Court of the United States

MILWAUKEE SAFEGUARD INSURANCE COMPANY, ET AL.,

Petitioners,

v.

STEPHEN F. SELCKE, DIRECTOR OF THE ILLINOIS DEPARTMENT OF INSURANCE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court of Illinois, First Judicial District

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENTS

The disclosure statements required by Supreme Court Rule 29.6 are contained in the Appendix to the Petition for Writ of Certiorari on pages 69-74.

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ARGUMENT

I. Forcing Petitioners To Disprove The Pass-On Defense Denies Them A Clear And Certain Remedy

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation*, 496 U.S. 18 (1990), this Court unanimously ruled that where a State requires a taxpayer to pay an unconstitutionally discriminatory tax before challenging it, federal Due Process requires the State to provide "meaningful backward-looking relief," curing the past discrimination by (1) refunding the discriminatory tax, (2) retroactively collecting taxes from the favored class, or (3) some combination thereof. *Id.* at 40-41. Here, the State of Illinois required Petitioners to pay the Privilege Tax before challenging it. Petitioners paid their disputed tax under protest, and the money has been segregated in a special account. Petitioners' challenge was successful; the Illinois Supreme Court ruled that the Privilege Tax was unconstitutionally discriminatory.

The State, however, has utterly refused Petitioners the clear and certain remedy mandated by federal Due Process. Despite having no legal or equitable claim to Petitioners' money, the State refuses to return it. Instead, the State has erected obstacle after obstacle, now asserting, for the first time after seven years of litigation, that Petitioners must prove that they bore the burden of the Privilege Tax before the State will return Petitioners' money. The Illinois courts have now fully considered the issue, and have erroneously ruled that the State may continue to drag Petitioners through burdensome, time-consuming and costly litigation, forcing Petitioners to disprove the pass-on defense.

The federal Due Process Clause protects Petitioners from having to engage in such litigation at all, because requiring Petitioners to disprove the pass-on defense denies them a clear and certain remedy. This Court unanimously rejected the pass-on defense as a matter of law in *McKesson*; no evidence had been presented to the lower

courts concerning whether the taxpayer passed on the discriminatory tax to customers. 496 U.S. at 46, n.30. The decision below directly conflicts with *McKesson* on this important federal constitutional issue.

Respondents, however, urge this Court to deny review and permit the state court proceeding to go forward, overlooking the central point that *federal Due Process prohibits the proceeding itself.* Respondents argue that this Court lacks jurisdiction to review the decision below (Op. 8-15)[1], and that further proceedings on a different cause of action – the issue whether the State of Illinois may offset Petitioners' refunds of Privilege Tax by imposing a different tax – could preclude this Court's review (Op. 10). As discussed below, Respondents fail on both counts.

Respondents' inability to reconcile the decision below with *McKesson* demonstrates that the decision below should be summarily reversed by this Court. *See, e.g., Newsweek, Inc. v. Florida Dep't of Revenue,* 522 U.S. 442 (1998). Alternatively, Petitioners urge this Court to grant certiorari and reverse the decision below. Without this Court's immediate intervention, Petitioners will be forced to undergo extensive additional litigation to defeat a defense that this Court has unanimously forbidden as a matter of federal Due Process.

II. The Petition Falls Squarely Under This Court's Jurisdiction

Respondents erroneously assert that this Court lacks jurisdiction to grant the Petition because the decision below is not a "final judgment or decree" under 28 U.S.C. §1257 and does not fall within the fourth category of cases described in this Court's decision in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975). Respondents argue

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[1] Respondents' Brief In Opposition To The Petition For Writ Of Certiorari is cited herein as "Op."

that (1) the federal issue presented in the Petition has not been finally decided (Op. 8-10); (2) Petitioners cannot prevail on nonfederal grounds (Op. 12); (3) further litigation will be required on a separate cause of action (Op. 12); and (4) "there is no federal policy at issue in this Petition." (Op. 13). Each of these arguments is refuted below.

A. The Federal Issue Has Been Finally Decided

Respondents insist that the decision is not final because after Petitioners' 59 separate trials, the Illinois Supreme Court might change its mind, accept review, and reverse the Appellate Court's decision on the pass-on defense. (Op. 7, 8-10, 12). The Illinois Supreme Court cannot change its mind on the central federal issue here: whether the State may force Petitioners to attempt to disprove the pass-on defense, despite what federal Due Process requires.

As Respondents' own cases show, this Court has long recognized that a state court has "finally decided" the federal issue where immediate review is necessary to vindicate a petitioner's federal Due Process rights in a civil case. For example, in *Shaffer v. Heitner*, 433 U.S. 186 (1977), cited by Respondents (Op. 13, n.7), this Court granted certiorari to review a Delaware Supreme Court decision holding that Due Process did not bar the State's assertion of jurisdiction over a corporation's nonresident officers and directors. *Id.* at 193-194. The state courts had not yet reached the merits of the dispute, but this Court properly asserted jurisdiction, stating that if the decision below was erroneous, "there should be no trial at all." *Id.* at 195, n.12, citing *Cox Broadcasting*, 420 U.S. at 485. *See also Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984) (Court had jurisdiction under §1257 where state court decision required proceedings challenged on Due Process grounds), citing *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286

(1980); and *Kulko v. California Superior Court*, 436 U.S. 84 (1978) (same).

Similarly, this Court has recognized that a lower court has finally decided an issue where immediate review is necessary to vindicate a federal constitutional right applicable to the states through Due Process. *See, e.g., Smalis v. Pennsylvania*, 476 U.S. 140 (1986) (reviewing state court decision ordering second trial in violation of Double Jeopardy); *see also Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Harris v. Washington*, 404 U.S. 55 (1971); *Colombo v. New York*, 405 U.S. 9 (1972), and cases cited in Petition at 27, n.15. Nor has this Court limited its review to lower court decisions infringing on constitutional rights. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court recognized its jurisdiction to review a lower court decision denying a claim of qualified immunity, because qualified immunity is a right "not to stand trial" that is "effectively unreviewable on appeal from a final judgment." *Id.* at 525, 527.

Here, the federal Due Process Clause bars the very proceeding that the decision below mandates. Requiring Petitioners to defeat the pass-on defense violates their federal Due Process right to a clear and certain remedy. If the decision below is not immediately reviewed, this Court will have no later opportunity to vindicate Petitioners' federal constitutional rights.[2]

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[2] Respondents' reliance on *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997) (Op. 9-10) is misplaced for at least three reasons. First, the petitioners there argued that they fell within the second and third categories described in *Cox Broadcasting*, not the fourth. *Id.* at 82. Second, the petitioners did not argue that the state court proceeding was prohibited by the U.S. Constitution or otherwise. Finally, this Court correctly noted that the facts to be developed in the trial court might preclude the petitioners' federal claim; if the petitioners were unable to establish that Ms. Jefferson's death was caused by the City, it would not be necessary to determine whether their claim was governed by state or federal law. *Id.*

Nonetheless, it is not necessary for this Court to conclude that federal Due Process provides Petitioners the equivalent of a constitutional right "not to stand trial." This Court exercises jurisdiction where an important, non-constitutional federal issue is implicated and postponing review would subject the petitioner to "long and complex litigation which may all be for naught if consideration of the preliminary question . . . is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963). Here, any further litigation in the Illinois courts on the pass-on defense would subject Petitioners to long and complex litigation, replete with "theoretical, factual and practical difficulties" (496 U.S. at 47, n.31), all of which will be for nothing, because this Court's unanimous decision in *McKesson* makes clear that the pass-on defense does not apply as a matter of law in the context of a discriminatory tax. *See also Local No. 438 Cons and Gen. Laborers Union v. Curry*, 371 U.S. 542 (1963) (interlocutory state court order reviewable under §1257 where state court lacked power to adjudicate the issue).

That the Appellate Court's decision is interlocutory presents no jurisdictional bar. This Court often reviews issues arising on an interlocutory basis in state courts where the state court's action or inaction amounts to a final decision on the federal issue. *See, e.g., Local No. 438, supra* at 550; *M.I.C. Ltd. v. Bedford Township*, 463 U.S. 1341 (1983) (Brennan, Circuit Justice) (where "state's highest court has refused either to lift the challenged restraint or to provide for immediate appellate review[,] . . . the state court has decided finally" to maintain the restriction); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977) (interlocutory order of Illinois Supreme Court was "final" where it determined the merits of petitioners' asserted federal constitutional rights); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327 (1975) (Blackmun, J., in chambers) (interlocutory state court decision was "final" where it restricted First Amendment rights). Here, too, the state

courts have finally decided the critical federal constitutional issue – whether requiring Petitioners to prove that they bore the burden of the unconstitutionally discriminatory Privilege Tax denies them a clear and certain remedy. The Appellate Court "finally decided" the issue when it mandated that Petitioners disprove the pass-on defense. The Illinois Supreme Court "finally decided" the issue when it refused to accept Petitioners' appeal.

B. Petitioners Might Prevail On Non-Federal Grounds

Respondents falsely claim that "Petitioners tacitly admit that they passed the Privilege Tax on to their policyholders" (Op. 12), and based on this claim, assert that Petitioners cannot prevail on non-federal grounds. Petitioners do not, tacitly or otherwise, admit that they passed the Privilege Tax on to policyholders.

This Court concluded in *McKesson* that a business taxpayer subject to a discriminatory tax bears the burden of that tax *as a matter of law*, because the business is forced either to make a lower profit than its favored competitors, or to charge customers a higher price for the same product, thus losing sales. 496 U.S. at 48-49. Either way, this Court concluded, the business subject to the discriminatory tax bears the burden of the tax. As indicated in the Petition (Pet. 19), Petitioners could ultimately prove that they bore the burden of the discriminatory Privilege Tax *as a matter of fact*. Even Respondents' own analysis, prepared by their own Task Force and never tested in the trial court, concludes that Petitioners bore as much as 30 percent of the burden of the Privilege Tax.[3] If Petitioners were to prevail by proving that they bore the entire burden of the Privilege Tax, this Court would have

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[3] Interim Report of the Illinois Insurance Task Force, 24 Ill. Reg. 16820, 16825, cited at Op. 15.

no opportunity to vindicate the federal Due Process claim presented by the Petition.

C. Reversal Of The Appellate Court Would Preclude Further Litigation On This Cause Of Action

Reversal of the decision below would enforce this Court's unanimous decision in *McKesson* by precluding any further litigation on the pass-on defense. Respondents do not claim otherwise. Respondents argue instead that a reversal of the decision below would not preclude further litigation on a different cause of action – whether the State of Illinois has any offsets to Petitioners' refunds of the discriminatory Privilege Tax. (Op. 12).

Petitioners' complaints involve two separate causes of action, each stated in different counts in Petitioners' complaints. Count I of Petitioners' complaints alleged that the Privilege Tax was unconstitutional. The Illinois Supreme Court addressed this cause of action separately in 1997, holding the Privilege Tax unconstitutional. Count II of Petitioners' complaints alleged that the State could not offset Petitioners' refunds of Privilege Tax by retroactively imposing a different tax, the Illinois Retaliatory Tax. Respondents do not dispute that reversal of the decision below would preclude further litigation on the cause of action presented in Count I – whether Petitioners are entitled to refunds of the unconstitutional Privilege Tax.

Respondents erroneously argue that the offset issue could eliminate Petitioners' refund claims, thus mooting the need for this Court's review. (Op. 10). Respondents are wrong for at least two reasons. First, the Circuit Court of Cook County has already ruled in Petitioners' favor on the cause of action in Count II. (*See* Pet. 4). Second, as Respondents concede (Op. 5), certain Petitioners will be entitled to refunds no matter how the state courts rule on the offset issue. Respondents omit to mention that *more*

than half of the Petitioners have protested funds that exceed the State's offset claim against them.[4] Thus, most of the Petitioners will be entitled to refunds no matter how the state courts rule on the Retaliatory Tax offset issue.

D. Refusal To Conduct An Immediate Review Will Seriously Erode Federal Policy

Respondents' assertion that "there is no federal policy at issue in this Petition" (Op. 13) merely underscores the need for this Court's immediate review. The State of Illinois has chosen to evade the federal Due Process Clause and this Court's unanimous decision in *McKesson*. If this Court declines to grant certiorari and reverse the decision below, other states will doubtless follow Illinois' lead.

This Court's refusal to conduct an immediate review of the decision below will seriously jeopardize the protections of the federal Due Process Clause. (Pet. 17-19). The decision below has serious and immediate implications for Illinois business taxpayers and state business taxpayers nationwide (Pet. 17). Moreover, this Court's refusal to conduct an immediate review could encourage further discriminatory state taxation (Pet. 18-19; see also *Brief Amicus Curiae of the Council On State Taxation* at 9-10).

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[4] This is because more than half of the Petitioners are domiciled in states with overall premium tax burdens less than 2.0%, including Michigan, Wisconsin and Connecticut. Respondents' offset claim could only eliminate refunds of Privilege Tax to Petitioners domiciled in states with premium tax burdens of 2.0% or more. In fact, Respondents have already paid partial refunds to two companies domiciled in Michigan. (Pet. App. 6).

III. Respondents' Remaining Arguments Are Meritless

Respondents' remaining arguments are easily dismissed. For example, Respondents repeatedly assert that the State is merely trying to force Petitioners to "establish their damages just like any other plaintiff in a civil case." (Op. 14; see also Op. 15, 22). Respondents misunderstand *McKesson*, which explicitly noted that damages from the imposition of a discriminatory tax are irrelevant, stating "the State's obligation under the Due Process Clause to provide a refund . . . extends only to refunding the excess taxes collected . . . Petitioner has not sought in this action to recover any actual damages it may have suffered." 496 U.S. at 49, n.33. Here, as in *McKesson*, Petitioners do not seek to recover any actual damages they may have suffered as a result of the State imposing the unconstitutionally discriminatory Privilege Tax for more than 100 years. Rather, Petitioners ask this Court to reverse the decision below and require the State to return Petitioners' property.

In addition, Respondents erroneously assert that review is unnecessary because state courts are correctly interpreting *McKesson*. (Op. 17). However, several associations of insurers report that the state courts are in "manifest confusion" over the proper interpretation of *McKesson*, citing state court decisions interpreting *McKesson* both to preclude and to permit the pass-on defense. *See Brief Amici Curiae of the American Insurance Association, et al.* at 5-7.

Respondents emphasize that the Court in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) remanded the case to the Georgia courts, that the Georgia Supreme Court permitted the pass-on defense on remand, and that this Court then refused to grant certiorari. (Op. 20-21). Respondents ignore that (1) the Court was unable to agree on a majority or plurality opinion that described

the rationale for the remand in *Beam* (Pet. 13, n.6), (2) Georgia law provided several adequate pre-payment procedures for challenging the disputed tax (*see* 437 S.E.2d 782, 784-87 (Ga. 1983)), which affected the State's federal Due Process obligation, and (3) no inference may be drawn from the denial of certiorari. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 (1973).

Respondents allege that the Petition "misleadingly cite[s]" this Court's decision in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) to illustrate this Court's continuing rejection of the pass-on defense. (Op. 18). To the contrary, this Court's citation to *McKesson* in *Harper* is highly illuminating. *Harper* held that a State may not "confine petitioners to a lesser remedy" than Due Process requires, citing *the very pages of McKesson* that rejected the pass-on defense. 509 U.S. at 102.

Finally, Respondents rely on *California v. ARC America Corp.*, 490 U.S. 93 (1989) for the proposition that this Court has "expressly limited" its decision in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) to cases arising under the federal antitrust laws. (Op. 15, n.9). Respondents overlook that *California* pre-dates *McKesson*, in which the Court expressly noted the relevance of its rejection of the pass-on defense in the antitrust context to the question presented here. *See* 496 U.S. at 46-47, nn. 30-33.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, in view of the conflict of the Appellate Court's decision with *McKesson* and other decisions of this Court, the Court may wish to consider summary reversal.

Respectfully submitted,

April 2002

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